Litigation Section of The State Bar of Califonia

Litigation Update

50th Anniversary Issue!

Litigation Section News

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Just take a peek, no more, or you're disqualified. What are your duties when you realize that a document, sent to you by your opponent in response to discovery requests, contains material subject to attorney client or work product privilege? In *Rico v. Mitsubishi Motors Corp*. (Cal.Supr.Ct.; December 13, 2007) 42 Cal.4th 807, [171 P.3d 1092, 68 Cal.Rptr.3d 758, 2007 DJDAR 18307] plaintiff's lawyers couldn't believe their luck when this happened; they quickly shared the incriminating document with their experts and thought they had hit the jackpot in their case. Except it is no longer their case.

The California Supreme Court held that, when faced with such a situation, lawyers may only examine the document up to the point where they should realize it contains privileged information. Then they must stop reading and advise their opponents. Thereafter the parties must either work out how to deal with the matter or seek the court's assistance in doing so. In *Rico* our Supreme Court affirmed the trial court's ruling disqualifying the lawyers who had taken advantage of their opponents' error and so were the experts with whom they had shared the information.

Settlement letter in unrelated litigation is not privileged. Although *Evid. Code* §1152(a), makes offers to compromise inadmissible in subsequent litigation, this limitation only applies in the litigation in which the settlement discussions took place. In *Zhou v. Unisource Worldwide, Inc.* (Cal. App. Second Dist., Div. 7; December 17, 2007) 157 Cal.App.4th 1471, [69 Cal.Rptr.3d 273, 2007 DJDAR 18500], the trial court excluded correspondence between plaintiff and the insurance company involved in a separate, later accident. This was error but did not warrant reversal of the judgment for plaintiff.

Los Angeles Superior Court may not compel disclosure of work product by general order. Los Angeles Superior Court Second Amended General Order 29 mandates certain disclosures by plaintiffs in asbestos cases. To the extent that the order requires disclosure of information protected by the attorney work product privilege, it is invalid. The Court of Appeal granted plaintiff's writ petition and reversed an order of dismissal entered after plaintiff failed to provide this information as required by the General Order. *Snyder v. Sup.Ct. (Caterpillar, Inc.)* (Cal. App. Second Dist., Div. 2; December 18, 2007) 157 Cal.App.4th 1530, [69 Cal.Rptr.3d ___, 2007 DJDAR 18590].

Continued representation by attorney for statute of limitations purposes may present a question of fact. *Civ.Proc.* §340.6(a)(2) provides that the statute of limitations for an action for legal malpractice is tolled "during the time that . . . the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." In *Nielsen v. Beck* (Cal. App. Second Dist., Div. 3; December 18, 2007) (As Modified, Jan. 7, 2008) 157 Cal. App. 4th 1041, [2007 DJDAR 18193]. Paula Beck had represented the client until she was substituted out. More than four years after the substitution was filed, plaintiff sued her for legal malpractice. After Beck was substituted out, but within four years before the filing of the complaint, the new attorney had consulted with Beck concerning the case and Beck had billed the client for this consultation. The Court of Appeal concluded that, whether this consultation constituted continued representation, thus, tolling the statute of limitations was a triable issue of fact and reversed summary judgment in Beck's favor.

Motion to compel production must be made within 60 days of objections. In our December issue we noted that there is a 60-day limitation on a motion to compel production of documents. We failed to cite any authority for this proposition and some readers accused your editor of making up this rule. He did not! But he did fail to note the citation to the case that so held. The case has the intriguing name of *Unzipped Apparel, LLC v. Bader* (2007) 156 Cal.App.4th 123, [67 Cal.Rptr.3d 111]. Perhaps your editor's subconscious sense of modesty kept him from providing you with this information.

Right to amend complaint does not stop when some parties file an answer. *Civ. Proc.* §472 permits plaintiff to file an

amended pleading after a demurrer is filed and before the hearing on the demurrer. In *Barton v. Khan* (Cal. App. Second Dist., Div. 5; December 13, 2007) 157 Cal.App.4th 1216, [69 Cal.Rptr.3d 238, 2007 DJDAR 18379], some defendants demurred, another filed an answer. Thereafter, plaintiff attempted to file an amended complaint but the court clerks refused to accept it because an answer had been filed. [As usual, the clerks thought it was part of their job to make legal decisions.] The trial court sustained the demurrer without leave to amend. The clerks and the judge were both wrong. The Court of Appeal held that §472 applies as to each defendant. Because some had demurred, plaintiff had an absolute right to amend the complaint.

Discovery is reopened after reversal of judgment. After a mistrial, order granting a new trial, or reversal on appeal, discovery is reopened. The fact that party failed to disclose an expert in first trial did not preclude use of the expert in the second trial if properly disclosed before that trial. *Hirano v. Hirano* (Cal. App. Second Dist., Div. 8; December 19, 2007) (As modified Jan. 2, 2008) 158 Cal.App.4th 1, [2007 DJDAR 18636].

Free speech rights trump mall owner's property rights. In *Fashion Valley Mall LLC v. National Labor Relations Board* (Cal.Supr.Ct.; December 24, 2007) 42 Cal.4th 850, [183 L.R.R.M. 2327; 155 Lab. Cas. (CCH) P60, 529, 2007 DJDAR 18901], the California Supreme Court answered a question posed to it by the United States Court of Appeals for the District of Columbia Circuit: under California law, could the owners of a shopping mall prevent picketers from urging customers to boycott a particular store? In a 4-3 decision our Supreme Court answered the question in the negative. California law permits the exercise of free speech and petitioning in private shopping centers. Such exercise is limited by the right of shopping centers to impose reasonable time, place and manner restrictions. But they may not limit the content of the speech.

Insureds' breach of notice or cooperation provisions of policy does not excuse insurers' performance in the absence of prejudice. Liability insurance policies typically contain provisions purporting to avoid coverage if the insureds fail to give the insurer prompt notice of claims or fail to cooperate in defending against the claim. In *Belz v. Clarendon America Insurance Co.* (Cal. App. Second Dist., Div. 1; December 28, 2007) 158 Cal.App.4th 615, [2008 DJDAR 7], the insured defendant permitted a default to be entered and failed to notify the insurer. After entry of judgment in favor of plaintiff, plaintiff sued the insurer seeking payment on the default judgment. The trial court granted the insurer's motion for summary judgment. But the Court of Appeal reversed. Breach of the insured's duty to notify the insurer and to cooperate in defending the case does not automatically void coverage. The insurer must show actual, substantial prejudice as a result of the insured's breach before it can avoid coverage.

Unless plaintiffs suffer "injury in fact" they have not standing under Proposition 64. Since the voters' adoption of Proposition 64, plaintiffs only have standing to sue under the Unfair Competition Law (*Bus. & Prof. Code* §17200) if they "have lost money or property as a result of unfair competition." Where plaintiff ordered a book based on an offer for a "free trial period," and defendant sent a bill during this period which plaintiff did not pay at the time, he did not suffer "injury in fact" because he had not "lost money or property." Hence he lacked standing to bring the action under the UCL. *Hall v. Time Inc.* (Cal. App. Fourth Dist., Div. 3; January 8, 2008) (As Modified January 28, 2008) 158 Cal.App.4th 847, [2008 DJDAR 225].